Supreme Judicial Court.

SUFFOLK, ss. NOV. TERM, 1865.

IN EQUITY.

EDMUND JACKSON, ET AL.

vs.

WENDELL PHILLIPS, ET AL.

Supplemental Brief of points and authorities for Charles Palmer and Harriette M. Palmer, two of the Respondents, on the re-argument of the cause.

THE grounds on which this cause was argued at the former hearing on behalf of these Respondents, may be briefly restated thus: —

I.

As to the trust "to create a public sentiment which will put an end to negro slavery in this country," it was insisted by the Respondents that the same could not be held to be a valid trust for public charity: —

First. Because such a trust must be either within the words of the Statute of Elizabeth, or within the analogies as settled by the course of judicial decisions, and that a trust to create a sentiment of any kind, cannot be deemed to be within the Statute or its analogies.

Second. That a trust to create a sentiment to put an end to negro slavery, would, having regard to the constitution and laws under which we live, be against public policy and thus be void.

Third. That looking to the means the Testator required to be employed, the only possible mode of executing the purpose of such a trust tends to servile insurrection or civil dissension, and thus would be repugnant to public policy.

Fourth. That this particular trust could never have been within the purview of the Statute of Elizabeth, since during that reign the slave-trade was fostered and rewarded.

Fifth. That the uncertainty of the means pointed out by the Testator to execute the trust were such that its execution could not be enforced or controlled by a Court of Equity, and, consequently, upon settled principles the trust is void.

To this we may here add the precise language of the Court in the case of Ommany *vs.* Butcher, 1 Turn. & Russ, 260.—confirmed, as it is, in a later case, Williams *vs.* Kershaw, 1 Keene, 275, 5 Law Jour. N. S. 84, as follows: "A trust to be executed by a Court must be of such a nature that it can be under the control of the Court. If the trust cannot be ascertained the Court cannot see to the execution of it. It becomes too general and indefinite."

Next as to the trust in Article *Five*, of a fund to be expended "for the benefit of fugitive slaves who may escape from the slave-holding states of this infamous union," it was insisted that its purpose was clearly to effect an object repugnant to our constitution and laws, and that, if otherwise, its mode of execution was too vague to be carried into effect by a Court of Equity.

II.

In relation to the trust fund to be applied to secure "the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage, and devise property, and all other civil rights enjoyed by men," the grounds of objection were the same, except that under this trust its repugnancy to public policy and the constitution and laws under which we live, though equally strong, stand upon a somewhat different footing. It has, also, the additional feature that the thing sought to be obtained by the trust, cannot, under our frame of government, be accomplished by "procuring the passage of laws," which is the purpose to which the fund is in terms devoted. And on this subject we here cite the case of Hope *vs.* Hope, 26 Law Journal, N. S., 417, 424.

III.

As no effort was made at the former argument to sustain these trusts as private trusts, it is sufficient for our present purposes to refer to our former brief to show the impossibility of their being so sustained.

As to the question in relation to the capital or trust fund, the income of which is payable for life to the Testator's son James and daughter Harriette, such capital to be paid and conveyed to the Trustees, under the *Fourth* Article, at the death of all the children of said son and daughter [born or to be born], at the former hearing it was contended that the capital was to vest in the Trustees at a period which violates the law against perpetuities, and that if so, upon the authorities, even in case of charity, the provision was void.

The Defendant's propose to add to the former discussion a few suggestions on the following points: —

I.

What rules are to govern the Court in determining whether a trust is or is not a charity?

II.

If these trusts cannot be sustained so as to carry into effect the Testator's declared purpose, are they of such a character as to fall within the principles adopted by English Courts of Equity, under which the fund is devoted by a scheme to other uses supposed to be analogous, and if they are (looking to our form of government), are these principles fit to be adopted in this country?

III.

But let us suppose that these trusts can be supported as public charities if their provisions can be carried out in a manner not repugnant to the policy of the law. The question then arises whether, if we look at the whole will and gather from it

the purpose and *animus* of the Testator, these trusts can stand if it be clear that the *means to be used* are repugnant to that policy.

Taking these questions in their order —

I.

First. As to what rules are to govern the Court in determining the question, What constitutes a public charity?

We have already, in our opening brief, cited the English and American Authorities to show that the doctrine, as now held, limits charitable bequests by the letter and spirit of the Statute of Elizabeth, and that the English Courts assert that they have "adopted a very narrow construction in deciding what is to be deemed a charitable purpose." It is obvious, unless this Court propose to embrace in public charities "objects of benevolence, liberality, and expanded humanity," they have no alternative but to be governed by the letter and spirit of the Statute of Elizabeth. The fact that recent investigations have shown that *the jurisdiction* over charities existed in Courts of Equity before the Statute of Elizabeth does not affect the question of what are public charities since the passing of that statute.

Wright *vs.* Meth. Episc. Socy., Hoff. Rep., 262–4.

We are aware that the question, what is within the spirit of the statute, though a judicial one, is necessarily, from the diversity of the minds to which the question is addressed, somewhat uncertain, but it having been settled that objects of general benevolence and humanity do not by reason of that character fall within the statute, the construction of its terms and spirit is to be governed by that doctrine. It would seem, therefore, that there must be found in the words of the statute enough to determine the question in each case, or that an analogy *to be distinctly pointed out* and traced, must govern the judicial exposition of it. It is believed that on a critical survey of the adjudicated cases in England and probably in this country it will

be found that they all range under this principle and can be vindicated by an application of it. If not, they ought not to be held to be sound, or to furnish fit precedents. It is submitted there is no other line of safety, and that the only alternative is to make each case as it arises a question merely for the benevolent discretion of the Court. If the rule above suggested be the true one, we may be permitted to ask in what part of the statute, letter or spirit, is there anything in which a trust to create a sentiment to put an end to negro slavery (irrespective of the legal objections to the means), is included as a public charity? During the reign of Elizabeth the slave-trade was in full vigor. Sir John Hawkins was engaged in it, received the Queen's approbation by a grant to use as his crest "a demi-Moor bound with a coil." Nor was the trade abolished till the year 1806 [See American Cyclopedia and Penny Cyclopedia, Articles "Slavery" and "Sir John Hawkins"].

The redemption of prisoners and captives mentioned in the Statute was that of the prisoners and captives of the Barbary rovers [see Attorney General *vs.* Iron-Mongers Co., 2 Mylne and K., 586, and the case of the Attorney General *vs.* Bishop of Landaff, cited therein]. The only other case we have found in which that clause of the statute has been applied is the Attorney General *vs.* Drapers Company, 4 Beavan, 67. The scheme in that case for disposition *cy pres* to poor debtors in prison is to be found in Tudor on Charities, p. 591.

Third. A public sentiment that has or will put an end to negro slavery in this country has been created and now exists,—and negro slavery itself is in process of extinction, and so nearly put an end to, that this bequest either becomes a mere private trust or is made null by want of an object. It has none of the characteristics of a public charity. The trust cannot be enforced or controlled by the Court, and if the Trustees die, it would be impossible for the Court to execute it.

II.

We proceed next to the question whether the *cy pres* doctrines of English Courts of Equity are applicable to this case, and if so, whether under our form of government they can or ought to be applied.

First. If the trusts in question are by this Court held to be technical public charities within the meaning of the law, the question of the application of the *cy pres* doctrine can have little interest for the heirs whom we represent. Possibly in this view, if slavery shall be legally extinguished at the time the fund vests in the Trustees, and these trusts shall be held to be charitable, — or if, under these circumstances, after the fund has vested it becomes inapplicable, — the heirs may be interested in the question whether treated as a charity devoted to a specific object, that object failing, it does not create a resulting trust in their favor. It would seem, if the Court should take this view of the case, that the question should be postponed till the extinction of slavery, the heirs at that time living to take. See Tudor on Charities, 224–5. Shelford on Mortmain, 648. Sir John Leach's opinion in the Iron-Monger's case, 2 Beavan, 315.

Jaque

Second. But unless this Court shall decide the bequests in this will to be technical charities, it is settled that the *cy pres* doctrine of the English Courts has no application, but the case falls under the common doctrine of trusts.

The English rule is thus stated: "Where *a charity* is the substance of the gift, and the particular object fails, the Court will *effectuate* the gift to charity by providing another mode." Shelford on Mortmain, p. 602. The principle relied on is too clear to require authorities.

Third. Although, therefore, the inquiry as to the adoption of the *cy pres* doctrine by our Court is to these parties merely a subject of curious interest, we will advert shortly to some of the features of that doctrine and to the cases which show that it is inapplicable to our form of government.

The best commentary upon this extraordinary doctrine of the English Courts is that of Sir William Grant in Cary *vs.* Abbot, 7 Veazie, 490. According to the established principles in England this power of application *cy pres* is in certain cases where there are no Trustees to be executed by the King under his sign-manual. Shelford on Mortmain, p. 269; Tudor on charities, p. 233. What king is to devise and direct a scheme under our institutions it is not easy to see. In cases where the property is vested in trust the Court of Chancery is to devise

No necessity for King sign manual In a case where trusts

and settle the scheme. Whether, in the exercise of this power, the Court is exercising a prerogative or a judicial power, has been sharply debated. See the opinion of Chief Justice Taney in Fontaine *vs.* Ravenel, 17 Howard, 369, and Beckman *vs.* Bonson, 23 N. Y. Rep., 298.

That the doctrine is inapplicable to our institutions see Ayres *vs.* Methodist Church, 3 Sand. Sup. Court Rep., 351–366; Andrew *vs.* N. Y. Bible and Prayer Book Society, 4 Sand. Sup. Court Rep., 156, 178–179; White *vs.* Fisk, 22 Conn. R., 31; Whitman *vs.* Lex, 17 Sarg. and R., 88; Attorney General *vs.* Jolly, 2 Strob. Eq., 379; Carter *vs.* Balfour, 19 Alab., 814; Macaulay *vs.* Wilson, 1 Dev. Eq., 276; Dixon *vs.* Montgomery, 1 Swan, 348; Wheeler *vs.* Smith, 9 How., 55; Fontaine *vs.* Ravenel, 17 How., 369; Constitution of Mass., Art. 1, Sect. 30.

III.

As to the question, assuming that it were possible that these could be construed to be charitable trusts but for their repugnancy to public policy, can they be upheld upon the ground that the fund may be employed in a manner to effect the declared purposes by the prescribed means in a manner not repugnant to that policy; or will the Court look to the whole Will to find what was the real intent of the Testator with regard to the means to be used?

Upon this point the authorities to be adduced should be those which show the rules of construction where charitable trusts are in question, since there is a tendency in Courts to relax the rules of construction in favor of charities. In all other cases it seems to us that the rule of construction is open to no doubt. In cases of charitable trusts, so far as we can find, the only instances in which this question has arisen are those in which it depended on the intention of the Testator, to be derived from the whole will, whether the bequests did not violate the Statutes of Mortmain. Thus in Latham *vs.* Drummond, 11 Law Times, 324, upon one construction the fund might have been applied so as not to violate that statute; but it was decided that "the Court will not alter its *conception of the purpose of the Testator* merely to avoid the Statute of Mortmain." Again, in Longstaff *vs.* Rennison, 1 Drewry, 28, the Court declare that

* Our own Cases already cited show cy pres doctrine adopted — and Am. Acad v. Harv. Col. Pamphlet 59. C. J. Shaw — Ep — pres decision —

it is to be ascertained from the will what the Testator clearly contemplated, and if to carry into effect that purpose would violate the Statute of Mortmain they declare the bequest to be void, although the trust might be so executed as to get rid of the difficulty. See also Mather *vs.* Scott, 2 Keene, 172.

Supreme Judicial Court.

MARCH TERM, 1863.

EDMUND JACKSON, Executor, in Equity,

vs.

WENDELL PHILLIPS, et al.

BRIEF FOR DEFENDANTS,

CHARLES PALMER & HARRIETTE M. PALMER.

The declared purpose of the principal Trust under this Will (contained in Articles 4, 9, 10) is —

To "create a public sentiment that will put an end to negro slavery in this country."

The means prescribed are partly definite and partly indefinite, viz.: "the preparation and circulation of books, newspapers, the delivery of speeches and lectures, *and such other means* as will," in the judgment of the Trustees, create such sentiment.

The fund or property to effect this purpose is given to trustees and "their successors," to be expended at such *times* and *places* as they may deem best. "They are constituted a Board, with power to fill all vacancies by death or resignation."

Of the property devised and bequeathed, a portion is not to vest in the Trustees until a period that violates, as is believed, the rule against perpetuities; and the testator declares his desire that the Trustees "may become a permanent organization."

The son and two daughters, each of the latter having issue, survived him. The issue of one of the daughters (infants) file their answer by Guardian *ad litem.*

I.

The first question raised by this devise and bequest is, whether the trust thus attempted to be created can be supported as a public charity, since, if such be its character, the objection to which, as a mere trust, it may be open, for want of certainty or definiteness in the objects, loses something of its force (Shelford's Mortmain, 665; Morice *vs.* Bishop of Durham, 9 Vesey, 405; Mills *vs.* Farmer, 1 Merivale, 94, 98, 100; Hill's Trustees, 131. And further, the rule against perpetuities is inapplicable to it,

except as to that part of the fund which, by the will, is not to vest in the Trustees until after a period which violates the rule, — a point which will be adverted to hereafter.

II.

To determine whether a trust to create a public sentiment of the character set forth in this will, or of any character, constitutes a public charity, it is necessary to resort to the Statute of Elizabeth, and to the settled course of decisions under it, which establishes what objects fall within that statute, either in terms or by clear analogies, since the modern rule, in order to exclude all looseness or fanciful interpretation, confines the jurisdiction "to such charitable bequests as are within the letter and spirit of the statute" (2 Story's Equity, § 1155). "Bequests which, in a broad and comprehensive sense, may be deemed charities, such as objects of benevolence, liberality, and *expanded humanity*, are not charities within the provisions of the statute, but they must be within the specific enumeration of objects in the statute to entitle them to be enforced in the Court of Chancery" (2d Story's Equity, § 1164). "This Court has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the Statute of Elizabeth, or one of such purposes as the Court construes to be charitable by analogy to those mentioned in the statute. There is no charitable purpose which is not a benevolent purpose, and yet a trust to apply funds to a benevolent purpose has been held not to be a charitable trust" (Kendall *vs.* Granger, 5 Beavan, 300).

Most of the treatises which embrace among other things the subject of public charities, enumerate only a portion of the objects embraced by the statute. The Court will find the statute in Duke, p. 1, and the adjudications under it, down to comparatively modern times, in 2 Roper on Legacies, p. 1115; and it is hazarding nothing to say that the present bequest is not within the mere words of the statute.

III.

It remains next to find if a trust to create a sentiment of any kind, and especially one that will "put an end to negro slavery in this country," and when the means are as indefinite and open

to unrestricted use as in this case, falls within the purview of the statute, or cases decided to be within its analogies; and upon this question, it may be fit to quote, at the outset, the language of Sir Wm. Grant (9 Vesey, 406), viz.: "I am not aware of any case in which the bequest has been held charitable when the testator has not either *used that word* to denote his general purpose, or specified some particular purpose which this Court has determined to be charitable in its nature."

Under this head we submit,—

1. That no case has been found in which a bequest to create a sentiment of any kind, not even a sentiment which, if created, would lead to the effecting objects within the very words of the statute, has been sustained, either as a charity or even as a trust. Mere indirectness, aside from the uncertainty of means, would seem to be a fatal objection. Such a trust could hardly be controlled or enforced by any Court, and it will be shown hereafter that this feature is essential to the validity of all trusts.

2. But if trusts to create a sentiment which, when created, would tend to acts that fall within technical charities could be supported, yet looking to the special sentiment which is the object of this trust, the question meets us at the outset, How did the Testator design that this sentiment should be worked out to produce the result? Was it by proceedings repugnant to the policy of the law? If this be doubtful, the trust, though it were for a clear technical charity, must fail. Now the means, so far as they are prescribed, by which the sentiment is to be created, indicate clearly that the locality where it is to be created is not in the slaveholding States, for the Testator well knew that "speeches and lectures" calculated to effect the declared purpose could not be there delivered, nor could "books and newspapers" of the required description be there circulated openly and safely.

It is therefore a just inference, that the "public sentiment" was to be created in the non-slaveholding States. Indeed, the 5th Article of the Will, which shows the Testator's sense of the "deep iniquity and barefaced hypocrisy" of his own State, and his efforts to "help her out" of the same, enforces this conclusion. How, then, by means of public sentiment in the non-slaveholding States, is an end to be put to slavery? There would seem

to be but one way, viz.: by fraud, or force, or revolution; since no amendment of the Constitution of the United States, or abrogation of laws establishing slavery in the Southern States, could be affected by such sentiment. But suppose the Testator designed, by some means not obvious, to attempt to produce this public sentiment in the slaveholding States, where slavery is both a political institution and a source of power under the Constitution, and also a municipal rule of property, it is submitted that such a trust is void as against public policy.

Thus a bequest towards contributions which Testator expressed his belief would be begun towards the political restoration of the Jews, the Master of the Rolls says: — "If it could be understood to mean anything, it is to create a revolution in a friendly country. The promotion of such an object would not be consistent with our amicable relations with the Sublime Porte."

Habershon *vs.* Vardon, 4 DeG. & S., 467.
Thrupp *vs.* Collet, 26 Beavan, 125.
DeThemmines *vs.* DeBonneval, 5 Russell, 288.
DaCoster *vs.* DePaz, 2 Swanston, 487, note.

3. But if a trust merely to create a sentiment leading to public charity could be sustained, and if the mode in which the particular public sentiment may be put into effect to accomplish the prescribed purpose does not make void the trust as against public policy, yet no case can be found in which a trust having the object of this, however benevolent and philanthropic it may be deemed, has been declared to be within the Statute by analogy. Indeed, having regard to the English view of negro slavery in the reign of Elizabeth, its extinction could not have been within the design of the Statute.

IV.

There is another ground upon which this bequest must fail, whether it be treated as a public charity or as a mere trust for private benevolence, viz.: that, looking to the means so far as they are prescribed, and to the fact that other means are left indefinite, — these, coupled with the end to be accomplished, pro-

duce such a state of uncertainty that the Court cannot control or enforce the execution of the trust, and this renders the trust void.

1. Uncertainty in the objects or mode of distribution of the fund in cases of mere trust, is the most usual defect that defeats the trust. The leading case on this point is Morice *vs.* Bishop of Durham, 9 Vesey, 399; 10 Vesey, 521.

The cases are collected in Shelford on Mortmain, p. 83. The rule is thus succinctly stated by Lord Eldon:—"As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or if the Trustee dies the Court itself can execute the trust"; and the fact that the bequest confers the most unlimited control and discretion in the use of the fund, does not avoid the difficulty as to uncertainty.

Vesey *vs.* Jamson, 1 S. & St., 69.
Ellis *vs.* Selby, 7 Sim., 352.
Kendell *vs.* Granger, 5 Beavan, 300.

Trusts which would otherwise have been upheld as public charities (notwithstanding the principle that uncertainty in *the object* shall not defeat it), yet will be held void where there is such uncertainty in *the means pointed out* by the Testator that the Court cannot control its execution.

The case which establishes this doctrine (Brown *vs.* Yeall), is imperfectly reported in 7 Vesey, p. 50, note. But its principle is fully stated in subsequent cases, an account of which, not quite complete, is given in Shelford, p. 663. The bequest (not unlike that in this case) was "to purchase such books as by a proper disposition of them under the following directions might have a tendency to promote the interests of virtue and *religion* and the happiness of mankind. This *charitable* design, to be executed" under the direction of the Court of Chancery, Lord Thurlow was of opinion, as stated by Lord Eldon, that "the Testator, not having given the Court more specific direction as to the nature of the books to be purchased and circulated, than that they were to be such as might have a tendency to promote the interests of religion and virtue, and the happiness of mankind, had not given direction enough, and therefore held the

next-of-kin were entitled." (Attorney General *vs.* Stepney, 10 Vesey, p. 27.) It is true Sir Wm. Grant and Lord Eldon doubted whether the principle was rightly applied in that case, Lord Eldon saying that the Court might have understood Testator to mean the distribution of books for the promotion of religion. (10 Vesey, 540.) But he says (10 Vesey, p. 27) speaking of this case, "If this was that very case, I should feel myself bound to follow that decision."

V.

There is still another question, arising out of the 9th and 10th Articles of this Will, in respect to the provisions that the capital or trust funds, the income of which is payable for life to testator's son James and daughter Harriette, respectively, shall be *paid and conveyed* to the Trustees, under the 4th Article, at the death of all the children of said son and daughter, respectively (born or to be born); or if they leave no children at the time of their decease, then the capital or trust fund is, at the respective deaths of said son and daughter, to be *paid and conveyed* to said Trustees.

The question is, whether this provision for vesting the capital or fund in the last-named trustees violates the rule against perpetuities. Whether the bequest be deemed to be a public charity or a mere trust, if the objection be well founded it defeats the limitation over after the life-estate in favor of heirs and next-of-kin; since public charity would seem not to be so great a favorite of the law, that its rules, founded on a great public policy, are to be set at naught in its favor (Commissioners, &c., *vs.* DeClifford, 1 Drury, and Warren, 245–254).

1. Unless by the terms of the Will the whole trust-property was intended to vest in the Trustees named in the 4th Article immediately on the death of Testator, and the payment or transfer of it only to be postponed, then the trust clearly transcends the rule, since if the vesting is to be postponed to the death of grand-children of Testator, born or to be born, the limitation is undoubtedly void.

2. The effect of such a construction, viz., one that would vest the property at the death of Testator in Trustees, under Article 4, will be not to leave the income payable to Testator's grand-children until the death of the last survivor, but to de-

feat the purpose of this Will, and limit that payment to the period prescribed by the rule against perpetuities, and accelerate the enjoyment of the Trustees.

Curtis *vs.* Luken, 5 Beaven, 147.
1 Jarman on Wills, [252].

3. But all the elements which incline Courts to favor immediate vesting, are wanting in this case. There is no gift to the Trustees under Article 4, except in the direction to "pay and convey" the property on the happening of the event named. The income is not to be enjoyed by them until the period of payment and conveyance. They are not the descendants or family of Testator who may suffer from the contingent and unsettled state of his property. The usual argument applicable to cases where the vesting is held to be contingent instead of immediate, that no provision is made by will for the disposition of the estate in the happening of the contingency, has no application to this case.

4. Perhaps a decision of the question, whether this limitation under Articles nine and ten can be sustained, might, if the case turned on it, require to be suspended until it be determined whether the son and daughter of Testator may not respectively survive all their children, in which event the estate is to vest immediately in the Trustees, and so the rule would not be violated. The principle seems to be, that "when a limitation is made to take effect on two alternative events, one of which is too remote and the other valid, as within the prescribed limits, though the gift is void so far as depends on the remote event, it will be allowed to take effect on the happening of the valid one." (Lewis on Perpetuities, p. 501.)

VI.

We have, thus far, discussed the question whether Articles 4, 9, and 10 can be held to create a public charity. In doing this we have stated, among other things, the objections to its being held to be such a charity arising from uncertainty,—violation of public policy and infringement of the rule against perpetuities. We now proceed to consider the validity of these Articles, treated as not creating a public charity, but a trust, and —

1. *All of the objections above enumerated are of equal force, as applied to private trust.* Indeed that founded on uncertainity has, as we have shown, still more efficacy; and we refer, on these points, to the authorities already cited.

2. But viewed as a trust, another, and seemingly fatal, objection is to be found in the rule against perpetuities, not turning upon the postponement of the vesting of a portion of the fund in the Trustees, but upon the perpetual character of the trust itself.

That the Will contemplates the endurance of the trusts beyond a life or lives in being, and twenty-one years, is free from doubt, since the immediate bequest in Article 4 is to be expended at "such times" as the Trustees deem best; its expenditure is to effect an object not capable of rapid accomplishment, to wit, "to create a public sentiment"; the Trustees are constituted a Board, with provisions for perpetual succession by filling vacancies arising from death or resignation, the desire expressed that they may become "*a permanent organization*," and receive the future "donations and bequests of the friends of the slave"; and what is perhaps conclusive of the intent of Testator, he has, by Articles 9 and 10, bestowed funds and property on the Trustees, the use of which they are, in certain contingencies, not to enjoy until a period too remote under the rule.

If the Will did not thus make certain what was the expectation of the Testator, yet it is enough if it be left uncertain whether the Trust may or may not continue beyond the prescribed period, since that uncertainty is fatal to its validity.

Thus, in the recent case of Thompson *vs.* Shakespeare (H. R. V. Johnson's R., p. 612), Testator bequeathed £2,500 "to be laid out by my Executors as they shall think fit, with the concurrence of the Trustees of Shakespeare's House, already sanctioned by me in forming a museum at Shakespeare's house in Stratford." The Will also contained a bequest of a rent-charge forever of £30 upon Testator's estate, for wages of a guardian, whose duty was to be to give visitors an opportunity to inscribe lines in prose or verse in a book. Both bequests were controverted on the ground of uncertainty and remoteness. The Vice-Chancellor decided that the bequest of £2,500 was not a

charitable trust in its character, and that if it could be so considered, that it was void for vagueness. That if it were to be deemed that it was a bequest to gratify the private wishes of the purchasers of Shakespeare's house, "a club of *dilettanti*," it "becomes a perpetuity for mere private purposes"; and he draws the distinction between such a gift to parties to hold in trust and an absolute gift thus:—"This difficulty would be evaded if the gift could be taken to be made for the purchase of a museum to be presented to the Plaintiffs, to be placed in Shakespeare's house with their concurrence, *but to be in fact an absolute gift to these gentlemen personally, which, if so-minded, they were at liberty to sell.* But I think it clear that this was not the intention of the Testator."

The case was carried before the Lord-Justices (1st De Gex, Fisher *vs.* Jones, 399), and it was argued by Plaintiff that there might be no remoteness, for when the museum was completed the whole trust was exhausted, and the property became the private property of the subscribers. The Court held that it was a bequest to individuals in trust. "It is quite clear that the individuals who were to have the disbursement could not apply it to their own benefit, and that the *cestuis-que-trust* must be the subscribers to the fund with which Shakespeare's house was purchased; and that it was the intent of Testator, as derived from the Will, that it was to be perpetual," and so not being a charity it violated the rule.

A more recent case (Carne *vs.* Long, 2d De Gex, Fisher and Jones, 75), founded on a devise "to the Penzance Public Library, for the maintenance of the Library." The Library was held by Trustees for a voluntary association, one of whose rules provided that the institution should not be broken up so long as ten members remain.

It was argued for the Plaintiffs that "the body of the subscribers might at any time, without violating the terms of the gift, alienate the property devised, and apply its proceeds to purchase books and other articles necessary for the use of the society; but the Court held, notwithstanding that it was a "devise for the benefit of a subsisting society, and one that was *intended* to subsist so long as ten members remain, and the property comprised in the devise is thereupon to be taken out of commerce and become inalienable, not for a life or lives in

being, and twenty-one years, but so long as ten members remain. This seems to me a purpose which the law will not sanction as tending to perpetuity."

As, therefore, this fund for private benevolence not only might, from the character of testator's scheme, have been held under this trust more than 21 years after the expiration of the lives in being, which precede the vesting in the trustees; nay, more, as it is shown by the express terms of the will, that testator contemplated that a portion of the trust property was not to be enjoyed by the trustees until the death of his grand-children, born and to be born, it would seem to be clear that the trust cannot be maintained (See Palmer *vs.* Holford, 4 Russell, 403).

It may be added, if such trusts of remainders, in which no limitation of their endurance is expressly described, or where such limitation is not to be necessarily inferred from the objects of the trusts can be maintained, on the ground that possibly they may be executed within the twenty-one years, then the rule against perpetuities is vain, since such indefiniteness may always be made part of the instrument; and though the Trustees may in fact continue to hold and administer the fund long after the prescribed period, there is no principle of law which, so soon as they transcend the trust, allows the heir or next-of-kin, or any one else, to apply to have the further continuance of the trust stayed and the fund distributed.

VII.

The trust next in magnitude to the one already discussed, is found in the 6th and 8th Articles of the Will, and places in the hands of the Trustees $5,000 immediately, and the remainder of one-third of the residue of Testator's estate, after the death of his daughter Eliza, and his grand-daughter Lizzie, to be expended "in such sums, *at such time and in such places* as they may deem fit, to secure the passage of laws *granting women, whether married or unmarried, the right to vote, to hold office*, to hold, manage, and devise property, *and all other civil rights enjoyed by men.*"

The Trustees are — one gentleman of Boston, one married woman of the city of New York, and one single woman of Rochester, New York. They are constituted a Board, with power to add two to their number, and to fill up all vacancies; the

desire is expressed that "*they may become a permanent organization until the rights of women shall be established equal to men*," and the fund is to be invested, and, if need be, sold, and reinvested in bank or railroad shares.

The means of accomplishing the purpose are not so definitely prescribed as in Article 4, but are substantially the same, viz.: "and for the preparation and circulation of books, the delivery of lectures, and *such other means* as they may judge best."

The Testator, at the close of the Article (6th), says he has already paid the Trustees the $5,000, so that the decree sought in this case must regard solely the remainder of the one-third of the residue of Testator's estate.

The principles that are to determine the validity of this bequest, as distinguished from that in Article 4, may be qualified or invigorated by the feature which distinguishes it from that bequest, viz.: under this Article the thing to be accomplished is definite, viz.: "to secure the passage of laws." In the other, it was to create a "sentiment." The mode in which that sentiment was to produce the result, whether by force, revolution or amendment of the constitutions and laws of the slave States and the United States, or by what other means, is not stated; but it is submitted that, upon the question whether this bequest can be supported as a public charity or a private trust, the same principles which are applicable to the former trust will lead to the same results.

1. As a public charity the bequest must fail, as it is not within the words of the statute. No case can be produced in which a trust of a similar character has been pronounced to be, even by analogy, within the statute, nor will a thorough scrutiny of the objects embraced by the statute furnish any ground for such analogy.

If regard be had to the condition of society at the date of the statute, or to the state of the Common Law then, and ever since, as to the social, political, and legal position of women, married or unmarried, we should hardly expect to find a provision of this sort declared to be within its purview.

2. Whether, regarded as a private trust (if it were open to no other exception) it could be deemed as within the policy of the law to recognize and support a trust, one of whose objects

is to place political, judicial (and, it may be, military) power, in the hands of women, and this whether they be married or otherwise, is a question bare of authority.

It may be that a trust to produce by essays, arguments, or other means, a state of the public mind which should induce legislation whereby changes of existing laws, or the enactment of new ones, should be effected upon subjects within legislative power, and so consistent with our form of government, would (if not too vague and indirect to be executed by a Court) be held not repugnant to public policy — although, in Da Costa *vs.* DePaz (2d Swanston, 487, note), Lord Hardwicke held, as to a bequest for the maintenance of an assembly for reading the Jewish Scripture, and advancing the Jewish religion, thus: — "Although it is said this is a part of our religion, yet the subject of this bequest must be taken to be a contradiction to the Christian religion, which is a *part of the law of the land*"; and so it was declared void.

But a bequest to bring about a state of public mind which should change the whole form of existing government, could not but be held void, as repugnant to the policy of such government; and this, we think, would be true of all schemes to produce changes inconsistent with the entire frame of our institutions.

3. In this case, the thing to be accomplished by the trust cannot be done, even if it were consistent with public policy, in the manner in which alone the Testator declares it is to be done, viz.: by "the passage of laws," — to which method of reaching his end the Testator confines the use of his property. The Constitution, which cannot be altered by any mere law, has in terms excluded females from exercising the franchise of electors, and in the like manner, by the most clear implication and by the use of masculine designation, confined its political, judicial, and military offices to men.

4. Treated as a private trust, the same objection of uncertainty and vagueness, in the means of accomplishing the proposed end, lies to it which was made to that declared by Article 4; and Defendants refer to the cases cited in the previous portion of this trust. In the language of Sir Wm. Grant, "There can be no trust over the exercise of which the Court will not assume a control, for an uncontrollable power of disposition

would be ownership, not trust," and that a trust "too indefinite to be executed by a Court of Equity" leaves the property undisposed of. (9 Vesey, 408.)

5. Regarded as a private trust, its tendency to perpetuity is fatal to its validity. The doctrines of Courts of Equity on this point are so strong in support of the public policy, that mere tendency to violate it is said to be sufficient to govern its decrees.

VIII.

The trust contained in Article 5 of this Will, of two thousand dollars, to be expended at discretion "for the benefit of fugitive slaves who *may escape from the slaveholding States of this infamous Union*, from time to time," however humane and philanthropic, cannot safely be recognized as valid by Executors, unless it shall be sanctioned by this Court.

The objection to it is, that, by the Constitution and laws of what the Testator calls "this infamous Union," the escape of fugitive slaves is illegal, and the harboring such fugitive with knowledge of the fact is made penal. (See Act of Congress, Feb. 12, 1793, § 4.)

The mode in which the fund is to be expended "for the benefit" of such fugitive is not prescribed; but as the tendency of any aid to such fugitive is to encourage the violation of law, it cannot be sustained. The principle settled in the poacher's case (Thrupp *vs.* Corbett, 26 Beavan, 125), would seem to be decisive. It may be added, that, as a trust, aside from its illegality, it is like the trust already discussed, too vague to be administered by a Court; and if so, is void, upon the principle above stated.

Finally, if the trust under Articles 4, 9, 10, 6, and 8 are sustainable to any extent, yet the limitations over, upon the death of Testator's grand-children, born or to be born, will, in the contingency that the grand-children of Testator outlive their parents, be themselves void, as well as the ulterior trusts for charity or private benevolence which, by the Will, are to succeed them.